



COVID-19 ISSUE SPOTTING AND RECORD PRESERVATION TRAINING FOR DEFENDERS

May 19, 2020

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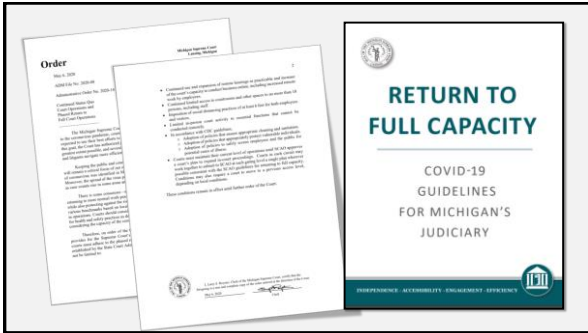


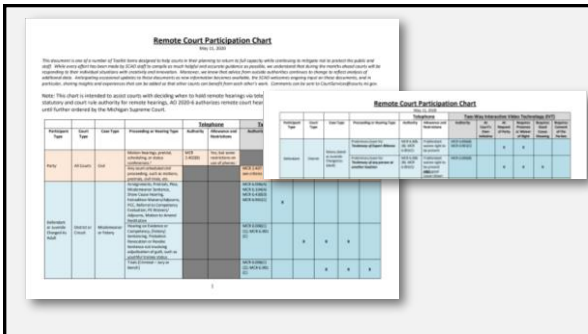
COVID-19

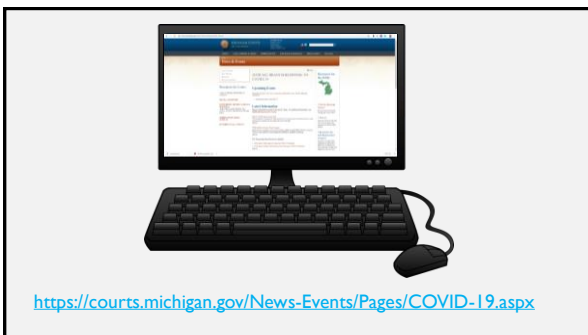
- Executive Order 2020-21 (March 23, 2020)
 - Temporary requirement to suspend activities that are not necessary to sustain or protect life
- Michigan Supreme Court Administrative Order 2020-2 (March 18, 2020)
 - Trial courts must continue to operate to provide essential functions.
 - The Supreme Court's Administrative Order makes clear that "[t]o the extent possible and consistent with MCR 6.006 and a defendant's constitutional and statutory rights" courts should conduct certain hearings remotely using **two-way interactive video technology or other remote participation tools**.
- Michigan Supreme Court Administrative Order 2020-6 (April 7, 2020)
 - Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely











<https://courts.michigan.gov/News-Events/Pages/COVID-19.aspx>

MIDC SPECIAL MEETING MARCH 27, 2020

The **MIDC's standards** for the timing of initial interviews and counsel appearing at arraignment and all critical proceedings **remain in effect**. The MIDC staff will work with funding units to facilitate any necessary modifications to compliance plans and/or budgets to ensure confidential attorney-client meetings take place remotely during the state of emergency and that attorneys appear in court on behalf of in-custody clients through technological means.

*Watch a recording of the March 27, 2020 meeting online:
<https://youtu.be/2jLqXx5ZWA>

MIDC STANDARD 2 – INITIAL INTERVIEW

- Confidential setting.
- Meet with in-custody clients within 3 business days from appointment.
- For out of custody clients, the standard requires the attorney to notify clients of the need for a prompt interview.

<https://michiganidc.gov/standards/>

MIDC STANDARD 4 – COUNSEL AT FIRST APPEARANCE AND ALL CRITICAL STAGES

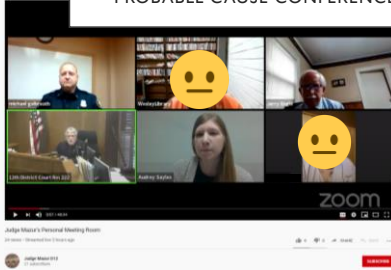
- Representation includes but is not limited to the arraignment on the complaint and warrant.
- Advocacy about bond determinations is included in the Standard.
- "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court."

<https://michiganidc.gov/standards/>

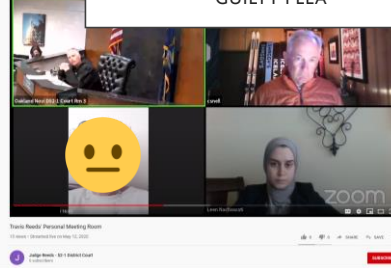
ADDITIONAL RESPONSIBILITIES PLACED ON DEFENSE COUNSEL

- Navigating technology
- Access to proceedings for clients
- Physical presence requested/required

PROBABLE CAUSE CONFERENCE

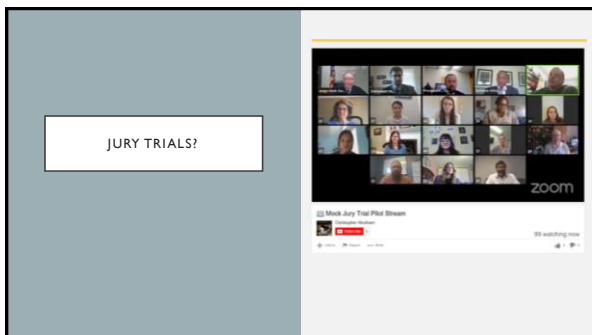


GUILTY PLEA









PRESENTATION
GOALS

The Beginning of the Discussion:
Food for Thought

Con Law for Quarantine


Assert Rights as Needed and in
Accordance With Strategy

Checklist/Cheat Sheet

**1ST AND 6TH AMENDMENT
RIGHT TO PUBLIC TRIAL**


- Suppression hearings, *Waller v Georgia*, 467 US 39 (1984)
- Jury Selection, *Presley v Georgia*, 558 US 209 (2010)
- "Traditionally Open" proceedings:
 - Preliminary Examinations? *Press-Enterprise Co v Cal. Sup.* 478 US 1 (1986)
 - Sentencing
 - Pleas
- 1st Amendment: Press/public have qualified right to attend
- Can be opened over parties' objections: 6th Amendment "does not guarantee the right to compel a private trial." *Gannett Co, Inc v DePasquale*, 443 US 368 (1979)

APPLICATION TO APOCALYPSE



Online Proceedings:

Are they public?
Partial or complete closure?
If they do count as closure, does pandemic justify?
Tech Issues: Snafus, lack of access



**Social Distancing Measures
for Non-Virtual Courts**

Space limitations?
Does pandemic justify
closure?

6TH AND 14TH AMENDMENT RIGHT TO BE PRESENT AND TO CONFRONT AND PRESENT WITNESSES

"[T]he accused shall enjoy the right to a speedy and public trial ... and to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor!" Sixth Amendment.

- Due Process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v Massachusetts*, 291 US 97, 105-106 (1934).

IS RIGHT TO BE PRESENT SATISFIED BY PRESENCE VIA VIDEO CONFERENCE?

"Why did the Supreme Court omit felony sentences from MCR 6.006(A)? Presumably because sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present."

"The courtroom setting provides 'a dignity essential' to the process of criminal adjudication."

People v Heller, 316 Mich App 314 (2016)

What does COMPULSORY PROCESS look like in the virtual world?

IF RIGHT TO CONFRONTATION IMPLICATED, IS VIRTUAL CONFRONTATION SUFFICIENT?

Maryland v Craig, 497 US 836 (1990)

- Only where the denial is "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."
- Individual, case-by-case determination
- Still good law?



6TH AMENDMENT RIGHT TO COUNSEL

All critical stages

- *Geders v United States*, 425 US 80 (1976) (conferring overnight)
- *Missouri v Frye*, 566 US 134 (2012); *Laffer v Cooper*, 566 US 156 (2012) (plea bargaining)

How might online courts infringe on right to counsel / interfere with the attorney client relationship?

- *Deck v Missouri*, 544 US 622 (2005) (physical restraints "diminishes" right to counsel)

Includes **effective assistance** – *Strickland v Washington*, 466 US 668 (1984)

EQUAL PROTECTION AND DUE PROCESS

"No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment.

Areas of concern

- Presumption of innocence
 - *Holbrook v Flynn*, 475 US 560, 569 (1986); *Estelle v Williams*, 425 US 501, 503 (1976)
- Wealth and access to "the raw materials integral to the building of an effective defense."
 - *Ake v Oklahoma*, 105 S Ct 1087 (1985); *Griffin v Illinois*, 351 US 12 (1956)

What procedural safeguards to ask for?

SPEEDY TRIAL

U.S. CONST. AM. VI;
CONST. 1963, ART. § 20
BARKER V WINGO, 407 US 514
(1972)

Length

Reasons

Did D assert?

Prejudice

- ≥ 18 months, prejudice presumed
- Must normally be trial prejudice (loss of evidence/witness)
- Custody status considered

JURY ISSUES

Fair Cross Section:

- *Duren v Missouri*, 439 US 357 (1979) (applies to entire jury pool)
- Distinctive group excluded
- Representation not "fair and reasonable" compared to population in community
- Systemic exclusion
- Need not be intentional under 6th Am.

Systemic Exclusion:

- Inherent in the jury selection process utilized, or a generally recurring problem
- Not merely occasional occurrence

PRESERVING AND CONSTITUTIONALIZING



Clear Issue Framed for Appeal



Better Standard of Review: De Novo vs. Plain Error



Easier to Overcome Harmless Error



Ramifications for Collateral Review: Procedural default

WAIVER VS FORFEITURE








Waiver:
Intentional relinquishment of known right

- Extinguishes error
- Party invites error or agrees to procedure
- Party expresses satisfaction or even says "no objection"
- Unconditional plea

Forfeiture:
Failure to timely and properly assert right

- Can still appeal but plain error (including for structural error)
- Remaining silent
- Failing to object on proper grounds or untimely
- Failure to get final/definitive ruling

MAKING THE RECORD

-  Timely
-  Final Ruling
-  Memorialize off-record discussions—side bars, in-chambers, breakout rooms
-  Watch for Inadvertent Waiver
-  State Federal and Legal Grounds
-  Eye and Ears of Appellate Court; Make Note of Glitches
-  Motion Practice

SPECIAL CIRCUMSTANCES

- Pro se clients and standby counsel
- *McKaskle v Wiggins*, 465 US 168 (1984)
- Counsel assists the pro se defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony.
- Counsel helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure.
- **Practical issues: have a clear process for communication between defendant, court, and indigent defense system (if applicable) ahead of proceedings.**

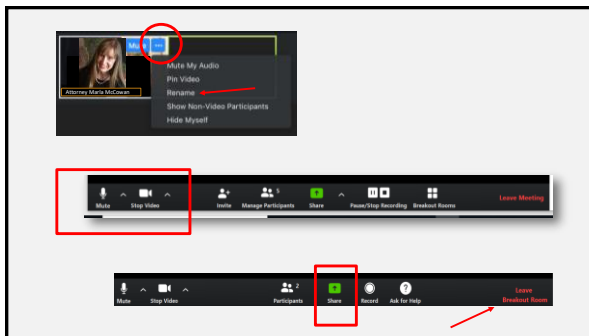
SPECIAL CIRCUMSTANCES

- Resources for indigent defendants to use experts and investigators
- MIDC Standard 3
- Court can make a finding of indigence at any time
- Indigent defense system has funding for experts, investigators and policy in place for using funds
- "MIDC rates" can be found on the <https://michiganmidc.gov/standards/>

Standard 3.1 Expenses for investigators will be considered at hourly rates not to exceed \$75. Expenses for expert witnesses will follow a tiered level of compensation based on education level and type of expert,* not to exceed these amounts:

| | |
|-----------------------------------|----------|
| High School or Equivalent | \$100/hr |
| Associate's Degree | \$150/hr |
| Bachelor's Degree | \$200/hr |
| Master's Degree | \$250/hr |
| Crim. Science and Related Experts | \$300/hr |
| CPA/Financial Expert | \$300/hr |
| Pharmacy/PharmD | \$225/hr |
| Information Technology Experts | \$225/hr |
| Ph.D./Academic Doctor | \$300/hr |

BEST PRACTICES



CHECKLISTS

ACCESS FOR CLIENTS

- ✓ Present
- ✓ Identification verified
- ✓ Able to hear, see, communicate
- ✓ Understands how to get counsel's attention

Checklist of things to remember in video court:

Please note that each individual case may require a different set of actions. This checklist is intended to provide a general guide but it is not prescriptive.

- ✓ Do I have a reliable internet connection?
 - ✓ am I stable?
- ✓ Can I be heard?
 - ✓ Is my full name displayed? (i.e. Attorney Jane Smith)
- ✓ Is my client present?
 - ✓ If my client is in jail, and the jail does not have internet access, and it is necessary that they be at the hearing, have I alerted to my client's attorney?
 - ✓ If my client is not present because he/she does not have access to the internet, have I alerted?
- ✓ If my client is appearing only by telephone, have I noted the potential bias that may affect the hearing?
 - ✓ Have I notified that the person on the phone is my client?
- ✓ If my client is not with me, but they are present virtually does he/she have a reliable internet connection?
 - ✓ If so, have I documented that fact to the court so that they have no reason to doubt its authenticity?
- ✓ Is my client's face fully visible?
 - ✓ Is my client's name displayed?
- ✓ Can my client be heard?
 - ✓ Can my client hear the proceedings?
 - ✓ Have I taken steps to ensure my client can understand the proceedings, especially if unable to hear or read?

Checklist of things to remember in video court:

Please note that each individual case may require a different set of actions. This checklist is intended to provide a general guide but it is not prescriptive.

- ✓ If my client needs an interpreter, am I sure that my client has been given access to one?
 - ✓ Is my client's language and cultural background pertinent in a way that does not prejudice his/her (i.e. person is elderly)?
- ✓ If not, have I alerted on the record the problems with my client's hearing?
 - ✓ Have I coached my client on how to speak up and engage on videoconferencing when appropriate?
- ✓ Have I coached my client on how to get my attention so that I can stop the hearing and have a breakout room/private session to answer his/her questions?
 - ✓ Have I communicated this process to the court?
- ✓ Have I established a secure, private form of communication with my client?
 - ✓ If possible, is that communication contemporaneous with the hearing?
- ✓ If not, have I established that the judge will stop the hearing so I can meet with my client confidentially?
 - ✓ Given the issues with potential communication over videoconferencing, does my client have access to visual aids that assist in understanding the hearing?
- ✓ Have I asked if I can record the hearing or if a copy of the online proceeding will be kept?
 - ✓ Have I checked to ensure that any transcripts have been deleted from the internet after the hearing is over?
- ✓ Have I reported any issues to my office/supervisor/other appropriate contact? (if applicable)

Prepared by the National Association for Public Defense

QUESTIONS?
